

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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|----------------------------|---|------------------------|
| FRANK J. FERNANDEZ, |) | |
| |) | |
| Plaintiff(s), |) | No. C 08-1266 CRB (PR) |
| |) | |
| v. |) | ORDER OF SERVICE |
| |) | |
| SUSAN RISENHOOVER, et al., |) | (Doc # 2) |
| |) | |
| Defendant(s). |) | |
| _____ |) | |

Plaintiff, a prisoner at Pelican Bay State Prison ("PBSP"), has filed a pro se civil rights complaint under 42 U.S.C. § 1983 and 28 U.S.C. § 1367 alleging that prison medical and administrative appeal process officials inappropriately denied his request for renewal of his extra mattress chrono for his lower-lumbar degenerative joint disease. Plaintiff claims that the inappropriate denial of his request to renew the chrono amounted to deliberate indifference to serious medical needs in violation of his Eighth Amendment rights and reckless negligence in violation of state law.

Plaintiff has paid the requisite filing fee, but seeks leave to proceed in forma pauperis under 28 U.S.C. § 1915 as to all other aspects of this litigation. Good cause show, plaintiff's request (doc # 2) is GRANTED.

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted," or "seeks monetary relief from a defendant who is immune from such relief." Id. § 1915A(b). Pro se pleadings must be liberally construed, however. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

B. Legal Claims

Deliberate indifference to serious medical needs violates the Eighth Amendment's proscription against cruel and unusual punishment. See Estelle v. Gamble, 429 US 97, 104 (1976). Liberally construed, plaintiff's allegations state a cognizable claim for relief for deliberate indifference under § 1983, and for medical negligence under California law, against the named defendants. See id.

But to whatever extent plaintiff alleges that prison administrative appeal process officials improperly screened out or canceled his administrative appeals, said allegations fail to state a claim under § 1983 and are dismissed. It is well-established that there is no constitutional right to a prison administrative appeal or grievance system, see Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003); Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988), and that a state's creation of a

1 prison administrative appeal or grievance system does not implicate a liberty
2 interest protected by the Due Process Clause, see Antonelli v. Sheahan, 81 F.3d
3 1422, 1430 (7th Cir. 1996); Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir.
4 1993).

5 CONCLUSION

6 For the foregoing reasons and for good cause shown,

7 1. The clerk shall issue summons and the United States Marshal shall
8 serve, without prepayment of fees, copies of the complaint in this matter, all
9 attachments thereto, and copies of this order on the following defendants at PBSP
10 and the California Department of Corrections and Rehabilitation in Sacramento
11 ("CDCR"): Susan Risenhoover, FNP (PBSP); Michael Sayre, MD (PBSP); C. E.
12 Wilber, CC II (PBSP); Joseph J. Kravitz, CC II (PBSP); Maureen McLean, FNP
13 (PBSP); R. Pimmentel, Captain (CDCR); and N. Grannis, Chief of Inmate
14 Appeals (CDCR). The clerk also shall serve a copy of this order on plaintiff.

15 2. In order to expedite the resolution of this case, the court orders as
16 follows:

17 a. No later than 90 days from the date of this order, defendants
18 shall file a motion for summary judgment or other dispositive motion. A motion
19 for summary judgment shall be supported by adequate factual documentation and
20 shall conform in all respects to Federal Rule of Civil Procedure 56, and shall
21 include as exhibits all records and incident reports stemming from the events at
22 issue. If defendants are of the opinion that this case cannot be resolved by
23 summary judgment or other dispositive motion, they shall so inform the court
24 prior to the date their motion is due. All papers filed with the court shall be
25 served promptly on plaintiff.

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1 b. Plaintiff's opposition to the dispositive motion shall be filed
2 with the court and served upon defendants no later than 30 days after defendants
3 serve plaintiff with the motion.

4 c. Plaintiff is advised that a motion for summary judgment
5 under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your
6 case. Rule 56 tells you what you must do in order to oppose a motion for
7 summary judgment. Generally, summary judgment must be granted when there
8 is no genuine issue of material fact--that is, if there is no real dispute about any
9 fact that would affect the result of your case, the party who asked for summary
10 judgment is entitled to judgment as a matter of law, which will end your case.
11 When a party you are suing makes a motion for summary judgment that is
12 properly supported by declarations (or other sworn testimony), you cannot simply
13 rely on what your complaint says. Instead, you must set out specific facts in
14 declarations, depositions, answers to interrogatories, or authenticated documents,
15 as provided in Rule 56(e), that contradicts the facts shown in the defendant's
16 declarations and documents and show that there is a genuine issue of material
17 fact for trial. If you do not submit your own evidence in opposition, summary
18 judgment, if appropriate, may be entered against you. If summary judgment is
19 granted, your case will be dismissed and there will be no trial. Rand v. Rowland,
20 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc) (App. A).

21 Plaintiff is also advised that a motion to dismiss for failure to exhaust
22 administrative remedies under 42 U.S.C. § 1997e(a) will, if granted, end your
23 case, albeit without prejudice. You must "develop a record" and present it in
24 your opposition in order to dispute any "factual record" presented by the
25 defendants in their motion to dismiss. Wyatt v. Terhune, 315 F.3d 1108, 1120
26 n.14 (9th Cir. 2003).

1 d. Defendants shall file a reply brief within 15 days of the date
2 on which plaintiff serves them with the opposition.

3 e. The motion shall be deemed submitted as of the date the
4 reply brief is due. No hearing will be held on the motion unless the court so
5 orders at a later date.

6 3. Discovery may be taken in accordance with the Federal Rules of
7 Civil Procedure. No further court order is required before the parties may
8 conduct discovery.

9 4. All communications by plaintiff with the court must be served on
10 defendants, or defendants' counsel once counsel has been designated, by mailing
11 a true copy of the document to defendants or defendants' counsel.

12 5. It is plaintiff's responsibility to prosecute this case. Plaintiff must
13 keep the court and all parties informed of any change of address and must comply
14 with the court's orders in a timely fashion. Failure to do so may result in the
15 dismissal of this action under Federal Rule of Civil Procedure 41(b).

16 SO ORDERED.

17 DATED: August 20, 2008

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20 CHARLES R. BREYER
21 United States District Judge
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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

FRANK J. FERNANDEZ,
Plaintiff,

Case Number: CV08-01266 CRB

CERTIFICATE OF SERVICE

v.

SUSAN RISENMOOVER et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 21, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Frank J. Fernandez D-61222
D3-110
P.O. Box 7500
Crescent City, CA 95531

Dated: August 21, 2008

Richard W. Wieking, Clerk
By: Barbara Espinoza, Deputy Clerk